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IMPAIRMENT ANALYSIS OF LOCAL
CIRCUIT SWITCHING FOR THE MASS
MARKET

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PUBLIC UTILITY COMMISSION

OF TEXAS

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PRELIMINARY ORDER

This proceeding was established at the direction of the Public Utility Commission of Texas to determine whether carriers competing for mass market customers are impaired without access to unbundled local circuit switching pursuant to the Federal Communication Commission's (FCC) Triennial Review Order (TRO).¹

I. Background

In its TRO, the FCC found that competitors are impaired without access to an incumbent local exchange company's (ILEC) switch on a national level when serving the mass market.² In addition, the FCC delegated to the states the responsibility to determine where competing carriers are not impaired without access to unbundled local circuit switching on a more detailed, market-by-market basis.³ Prior to conducting the impairment analysis for each identifiable market, the market must be defined.⁴ This entails determining the relevant geographic area to include in each market.⁵ Under the framework detailed in the TRO, the impairment review for each identified market is expected to be a two-step process. First, states are to evaluate the self-

¹ See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Report and Order on Remand and Further Notice of Proposed Rulemaking* (rel. Aug. 21, 2003) (TRO).

² See *Id.* ¶ 493.

³ See *Id.*

⁴ See *Id.* ¶ 495.

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provisioning and wholesale triggers. Second, if the self-provisioning trigger is met, states are to evaluate whether there are exceptional circumstances that still result in impairment, or, if neither trigger is met, states are to evaluate certain operational and economic criteria to determine whether a market is actually conducive to competitive entry and whether carriers in that market are not impaired without access to unbundled local circuit switching.⁶ If a state still finds impairment in a market after evaluating the operational and economic criteria, the state must evaluate whether impairment will be addressed by the use of rolling access to unbundled switching.⁷

The requirements in the TRO became effective on October 2, 2003, 30 days after publication⁸ of the TRO in the *Federal Register*.⁹ State commissions have only nine months from the effective date of the TRO to conduct the initial review.¹⁰ Accordingly, the Commission must complete this proceeding by July 2, 2004.

II. Procedural History

At its September 18, 2003 open meeting, the Commission addressed the TRO as it applies to an impairment analysis for local circuit switching for the mass market and authorized staff to establish this docket. In Order No. 1 issued on September 24, 2003, the Commission administrative law judge (ALJ) established October 9, 2003 as the deadline for interested parties to intervene in this proceeding and required intervenors to file a list of issues.

⁵ *See Id.*

⁶ *See Id.* ¶ 494.

⁷ *See Id.* ¶ 521.

⁸ *See* 68 Fed. Reg. 52276-52306 (Sept. 2, 2003) (to be codified at 47 C.F.R. pt. 51).

⁹ *See* TRO ¶ 830.

¹⁰ *Id.* ¶ 527.

A notice of intervention was filed by Western Communications, Inc. d/b/a Logix Communications on October 6, 2003; and by Save American Free Enterprise in Telecommunications Coalition (SAFETC); the State of Texas; the Office of Public Utility Counsel (OPUC); Southwestern Bell Telephone L.P. d/b/a SBC Texas; Pathway Com-Tel, Inc.; MCIMetro Access Transmission Services, Inc.; United Telephone Company of Texas d/b/a Sprint, Central Telephone Company of Texas D/b/a/ Sprint, and Sprint Communications Company L.P. (collectively Sprint); Birch Telecom of Texas LLP, Bullseye Telecom, Inc., nii communications, Ltd., and Z-Tel Communications, Inc. (collectively the CLEC Coalition); AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications Houston, Inc. (collectively AT&T); Covad Communications Company; and Sage Telecom of Texas, L.P. on October 9, 2003. Allegiance Telecom, Inc. filed a notice of intervention on October 15, 2003. The U.S. Department of Defense filed a notice of participation on October 3, and again on October 13, 2003. TEXALTEL filed a motion to intervene on October 20, 2003.

Lists of issues were submitted by the SAFETC, the State, OPUC, SBC Texas, the CLEC Coalition, Sprint, MCI, AT&T and Covad.

III. Jurisdiction

In Order No. 1, the Commission ALJ ruled that the Commission is acting under the federal authority granted to the FCC pursuant to section 251(d)(2) of the Federal Communications Act that the FCC has delegated to the states to conduct analyses in accordance with federal guidelines.¹¹ This market-specific analysis performed by this Commission will allow the FCC to properly determine the degree of unbundling of network elements required under section 251(d)(2) of the Act.¹² The Commission adopts the ALJ's ruling that, in conducting this proceeding, the Commission is acting in part under federal authority delegated to it by the FCC. The Commission notes, however, that it has authority under state law to

¹¹ See Order No. 1 at 3 (Sept. 24, 2003).

¹² See TRO ¶¶ 184, 186-190.

investigate competition in the telecommunications industry.¹³

IV. Nature of Proceeding

In delegating authority to the states to make certain market and impairment determinations, the FCC specified factors that must be considered and certain parameters regarding the analyses leading to those determinations, set some deadlines, and established some procedures to challenge state action or inaction. Other than these areas, the FCC did not specify any procedures that must be followed.

In this proceeding, the Commission will investigate competition in specific telecommunications markets, and evaluate facts related to the competitiveness of specific markets within the framework specified by the FCC. This detailed analysis is necessary to properly determine the degree of unbundling of network elements required under federal law.¹⁴ Consequently, the Commission concludes that this investigatory proceeding is not a contested case or rulemaking as defined by the Texas Administrative Procedure Act.¹⁵ Further, the Commission is not acting under a petition for arbitration or a complaint regarding any existing interconnection agreement. Even though the results of this proceeding may ultimately appear in interconnection agreements, the Commission concludes that this proceeding is not an arbitration of an interconnection agreement or a resolution of a post-interconnection dispute. Consequently, the Commission has some discretion in deciding how this proceeding should be conducted.

Due to the nature of the issues involved and the timelines faced under the TRO, the Commission concludes that this investigation should be conducted through a contested proceeding that generally follows the Commission's procedural rules for contested matters, but the Commission cannot conclusively determine at this time for this unique proceeding where it may deviate from these rules. The Commission does decide, however, that *ex parte* prohibitions

¹³ See PURA §§ 52.054-055, 52.104, 52.205, 60.021-22.

¹⁴ *Id.* ¶¶ 184, 186-190.

shall apply, and that interested parties may conduct discovery and avail themselves of the Commission's authority to compel the attendance of witnesses and the production of documents.

Further, the Commission recognizes the assistance it may provide to the parties to this proceeding by requesting basic information relevant to the issues presented. The Commission will issue this request to the parties in this proceeding. Responses, however, will be limited to those geographic areas initially identified by SBC Texas. Accordingly, the Commission will direct its ALJ to issue a bench request for information to all parties.

Parties shall present factual information to the Commission by sworn evidence, and opposing parties will be allowed to challenge that evidence both by cross examination and by presenting controverting evidence. Parties to this proceeding will be required, however, to bring forth all information in their custody and control that would inform the Commission on issues it must address in this proceeding. In section V of this Order, the Commission identifies specific information for which parties must present evidence, either through testimony or by documents supported by appropriate testimony.

In addition, the Commission tentatively decides that the parties may make oral closing arguments in lieu of post-hearing briefs. Because the Commission is hearing this matter, no proposal for decision will be prepared and exceptions and replies are not necessary. Also, due to the nature of this proceeding, the timelines, and the opportunity for recourse to the FCC, motions for rehearing are not required. Motions for reconsideration may be allowed, or the Commission may issue preliminary findings and allow comment by the parties. The Commission or its ALJ will issue further orders regarding procedures to be followed in this matter.

V. Structure of this Proceeding

The Commission concludes that this proceeding should be conducted in two phases. In the

¹⁵ See TEX. GOV'T CODE ANN. § 2001.003 (Vernon 2000).

first phase, the Commission will determine the specific geographic markets¹⁶ in which the impairment analyses will be conducted and analyze impairment under the self-provisioning trigger¹⁷ and the wholesale competition trigger.¹⁸ In the second phase, for those markets where the self-provisioning trigger is met, the Commission will determine whether there are significant barriers to entry such that services to mass-market customers is foreclosed even though this trigger is met.¹⁹ Also, if neither of the triggers is satisfied for a particular market, the Commission will analyze the potential deployment of competitive switches to determine whether that market is suitable for “multiple, competitive supply.”²⁰ In this analysis, the Commission will examine the actual deployment of competitive local circuit switches and whether there are operational barriers or economic barriers to entry into the mass market.²¹ As part of the economic barrier analysis, the Commission will determine the appropriate DS0 cross-over point between mass-market and enterprise-market customers.²² If the Commission concludes that competitive carriers are still impaired after applying the triggers and analyzing potential deployment, the Commission will consider the use of “rolling access to unbundled local circuit switching” to address impairment in the market.²³ The specifics of these two phases are discussed in detail below.

¹⁶ See TRO ¶¶ 495-96.

¹⁷ See *Id.* ¶¶ 498-500.

¹⁸ See *Id.* ¶¶ 501-03.

¹⁹ See *Id.* ¶ 503.

²⁰ *Id.* ¶ 506.

²¹ See *Id.* ¶¶ 508-520.

²² See *Id.* ¶ 497.

²³ See *Id.* ¶¶ 521-24.

A. Phase I - Market Definition and Trigger Analysis**1. Defining the Market**

SBC Texas is the only ILEC in this state that has identified areas that the Commission should conduct the detailed impairment analysis called for in the TRO.²⁴ The Commission tentatively decides that it will not define market areas outside of the geographic areas identified by SBC Texas (and consequently, will not analyze impairment outside of these areas). The identification of these areas will be the starting point from which the Commission will ultimately define the contours of each geographic specific market. Other parties will subsequently be allowed to challenge this initial identification of geographic areas and to proposed alternative market areas.

To assist the Commission in defining the market area in Phase I, SBC Texas shall provide evidence to identify all of its switches serving in each of the geographic areas identified, the central office where the switch is located, and the rate bands and UNE price zones for each office. For areas served by central offices not identified, the Commission tentatively concludes that SBC Texas has voluntarily accepted the obligation to continue providing unbundled switching and that an initial impairment analysis is not required in this proceeding. Further, because no other ILEC made a filing in this proceeding, this conclusion extends to the service area of all the other ILECs in Texas.

Similarly, competitive providers who participate in this proceeding shall provide evidence to identify the locations of the customers they serve in these geographic areas by specifying the central office that terminates the local loops serving its customers, the factors that affect their ability to serve each group of customers and the variation of those factors across the initially identified geographic areas, and their ability to target and serve these geographic areas economically and efficiently using currently available technologies. Competitive providers shall also identify any self-provisioned switches or any switches provided by a third-party wholesaler that they currently use, or have used in the past, to serve mass-market customers in the initially

²⁴ need cite

identified areas.

In mandating that parties provide evidence on particular matters, the Commission is not intending to limit the presentation of any other evidence by a party. Rather, the Commission is elaborating on the directive previously laid out in Section IV of this Order that parties will bring forward all information in their custody and control that would inform the Commission on issues it must address in this proceeding.

For the geographic areas initially identified by SBC Texas, any party may avail itself of discovery and present relevant information to assist the Commission in determining the geographic areas for each market. Parties must present evidence related to defining the market and to impairment in a manner that allows its use regardless of how the Commission ultimately defines the market.

2. Self-Provisioning Trigger and Competitive Wholesale Facilities Trigger

The Commission must use the two triggers identified by the FCC as the principal mechanism in evaluating whether requesting carriers are not impaired in a particular market. The self-provisioning trigger is met when three or more unaffiliated competing carriers are serving mass-market customers in a particular market with their own switches. If this trigger is met, the Commission must find that there is no impairment in that market.²⁵ Separately, the wholesale trigger is met when two or more unaffiliated competing carriers offer wholesale switching service for a market using their own switch.²⁶ If this trigger is met, the Commission must find competing carriers are not impaired in that market.

In Phase I, SBC Texas must show that either the self-provisioning trigger or the competitive wholesale facilities trigger is met in each market that it seeks to challenge the FCC's national finding. To make this showing, SBC Texas must demonstrate for each applicable trigger in each geographic market area that the requisite numbers of competitive providers exist, that the

²⁵ *Id.* ¶ 501.

providers are not affiliated with each other or with SBC Texas, and that the providers offer the necessary service. The SBC Texas may rely upon evidence provided by any other party in making this showing.

Every competitive provider participating in this proceeding shall identify for each geographic area initially identified by SBC Texas every switch that it uses to serve its mass-market customers, whether the switch is self-provisioned or provided by a third party, and any SBC Texas central office with which the switch is interconnected. Competitive providers shall also identify in each area all of its affiliates that own switches serving the mass market.

B. Phase II Issues

1. Exceptional Sources of Impairment

If the self-provisioning trigger is met for any defined market, parties will be allowed to show that significant barriers to entry exist in that market such that service to mass-market customers is foreclosed.²⁷ If the Commission agrees that there are exceptional barriers that prevent further entry into that market, the Commission can petition the FCC for a waiver of the application of the self-provisioning trigger.²⁸

The Commission concludes that competitive carriers have the self-interest and knowledge of such barriers that allow them to identify those markets that the Commission should evaluate for impairment. For those markets that satisfy the self-provisioning trigger but that no competing carrier identifies as one where significant barriers exist, the Commission will not evaluate those markets and will conclude that no such barriers exist.

Accordingly, in Phase II of this proceeding, competing carriers must identify those markets where the Commission should evaluate whether significant barriers to entry exists, identify the

²⁶ *Id.*, ¶504.

²⁷ *See Id.* ¶503

²⁸ *See Id.* ¶ 503.

barriers, and show why such barriers prevent further entry into the market.

For any market identified by a competing carrier, SBC Texas shall, for each central office located in that area, detail whether there is space available for collocation and any conditions or requirements that would limit the number of carriers that may have access to that space or that would delay immediate access to that space.

2. Analysis of Potential Deployment

In those markets where neither of the triggers evaluated in Phase I are met, the Commission must conduct further analyses to address the potential ability of competitive providers to deploy their own switches to serve the mass market.²⁹ In these analyses, the Commission must consider the use of competitive providers' own switches to serve the enterprise and mass markets, and operational and economic barriers.

a. Actual Deployment of Competitive Local Circuit Switches

In those markets where there are two wholesale providers or three self-provisioners of switching, unaffiliated with SBC Texas and with each other, to serve the voice enterprise market, the Commission must determine whether these providers are operationally and economically capable of serving the mass market. In addition, in markets where there is a competitive switch serving the mass market, the Commission must determine whether the market can support "multiple, competitive supply" and justify a finding of no impairment.³⁰

Competitive providers participating in this market will have, in Phase I, identified relevant switches and affiliate relationships regarding mass-market switches. In Phase II, competitive providers shall identify for each market area defined by the Commission every switch not identified in Phase I that it uses to serve its enterprise customers, and whether the switch is self-provisioned or provided by a third party. Competitive providers shall also identify in each

²⁹ See *Id.* ¶ 506.

market all of its affiliates not identified in Phase I that own switches serving that market. Competitive providers shall also address whether any switch serving mass-market customers that they self-provision has the capability to serve the entire mass market in the defined market area.

For any market area defined by the Commission, any party may avail itself of discovery and present relevant evidence to assist the Commission in determining the capability of the market to support multiple, competitive supply.

b. Operational Barriers

The Commission must consider the potential role of operational barriers, such as an ILEC's performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by an ILEC, and difficulties in obtaining cross-connects in an ILEC's wire center.

All parties participating in this proceeding shall detail their experiences with in each market area regarding the provisioning of loops, obtaining collocation space, and obtaining cross connects.

c. Economic Barriers

The Commission must examine whether economic factors associated with the use of competitive switching facilities are preventing entry into the mass market, and if not, whether requesting carriers are not impaired without access to unbundled local circuit switching for a particular market.³⁰ When conducting this examination, the Commission must consider the likely revenues and costs associated with mass market service to determine whether entry into this market is likely to be economic utilizing the most efficient network architecture available to

³⁰ *Id.* ¶ 510.

³¹ *See Id.* ¶ 515

and entrant.³²

Parties shall present evidence regarding potential revenues likely to be available and all potential costs likely to be incurred by a competing carrier in a given market. These potential revenues include those associated with providing voice services, including (but not restricted to) the basic retail price charged to the customer, the sale of vertical features, universal service payments, access charges, subscriber line charges, and if any, toll revenues.³³ These revenues shall also include revenues a competitor is likely to obtain from using its facilities for providing data and long-distance services from serving business customers. Similarly, parties shall present evidence on all factors affecting cost faced by a competitor providing local exchange service to the mass market. These costs include any capital costs, recurring and non-recurring operational costs, including any charges paid to the ILEC, migration costs and backhaul costs.³⁴ Parties shall address the impact on these costs of an entrant's likely market share, scale economics inherent in serving a wire center, and the line density of the wire center.³⁵

Every party in this proceeding shall present evidence on information in their custody and control related to any issued relevant to this analysis. As in all other aspects of this docket, for any relevant market area defined by the Commission that does not meet either trigger, any party may avail itself of discovery and present relevant evidence to assist the Commission in determining the capability of the market to support multiple, competitive supply.

d. Batch-Cut Process

The Commission has identified the ILEC's batch-cut process as an issue not to be addressed in this proceeding because it will be taken up in another proceeding. The Commission recognizes, however, that the rate for the batch-cut process impacts the economic evaluation

³² See *Id.* ¶ 517

³³ See *Id.* ¶ 519.

³⁴ See *Id.* ¶ 520.

discussed immediately above. Accordingly, the Commission intends to address the economics of the batch cut process to a limited extent in this docket.

In the separate batch-cut proceeding, the Commission will establish a batch-cut process and determine the rate for that process. In this docket, the Commission will set a benchmark for the batch-cut process for each market that would not result in impairment when considering all of the economic factors discussed above. If the batch-cut rate set in the other proceeding is less than the benchmark established in this proceeding for a particular market, then that market is not impaired due to the batch-cut process. If the batch-cut rate is higher than the benchmark, however, then that market will be impaired due to the batch-cut process. Additional guidance on the setting of the benchmark for the batch-cut process in this docket will be provided in a subsequent order issued by the Commission or the ALJ.

3. Determining the Appropriate DSO Cross Over Point between Mass Market and Enterprise Market Customers.

As part of the operational and economic analysis described above, the Commission must determine the appropriate cut-off between the mass market and the enterprise market for multi-line DSO customers.³⁶ “At some point, customers taking a sufficient number of DSO loops could be served in a manner similar to that described for enterprise customers—that is, voice services provided over one or more DSIs, including the same variety and quality of services and customer care that enterprise customers receive.”³⁷

In Phase II, parties shall address the appropriate demarcation point between a mass-market customer and an enterprise market customer.

³⁵ See *Id.*

³⁶ See *Id.* ¶ 459.

³⁷ *Id.* (Footnote 1544 omitted.)

4. Baseline Rolling Use of Unbundled Switching for Customer Acquisition Purposes

For each market that the Commission determines after applying all the analyses described above that requesting carriers are impaired in serving mass-market customers, the Commission must consider the use of “rolling access to unbundled local circuit switching” to address impairment in that market.³⁸ If impairment could be mitigated by granting requesting carriers access to unbundled local circuit switching for a temporary period, allowing carriers to first acquire customers using unbundled switching and later migrating these customers to the competitive carrier’s own switching facilities, the Commission must implement such rolling access.³⁹ The Commission must first consider whether granting access to unbundled switching for a transitional period of 90 days or more would address the impairment.⁴⁰

Parties shall present evidence to address those markets in which a “rolling access to access to unbundled local circuit switching” would cure impairment problems associated with economies of scale, churn, or other issues that would be addressed by temporary access to unbundled switching.

VI. Issues To Be Addressed

After reviewing the pleadings submitted by the parties, the Commission identifies the following issues that must be addressed in the two phases of this docket.

A. Phase I Issues

1. Are the geographic markets identified by the ILEC appropriately defined markets?
 - a. Does each such market area appropriately consider the locations of mass-market customers, if any, actually being served by competitive providers?

³⁸ See *Id.* ¶ 521.

³⁹ *Id.*

⁴⁰ See *Id.* ¶ 524.

- b. What are the factors affecting competitive carriers' ability to serve each group of customers? Does each market identified by the ILEC appropriately consider these factors?
 - c. What are the factors affecting competitive carriers' ability to target and serve specific markets profitably and efficiently using currently available technology? Does each market identified by the ILEC appropriately consider these factors?
 - d. Would a carrier serving in any such market alone be able to take advantage of available scale and scope economies from serving a wider market?
 - e. Do such markets appropriately consider the geographic variability of competitive providers' ability to use self-provisioned switches or switches provide by a third-party wholesaler to serve various groups of customers?
2. If the geographic markets identified by the ILEC do not appropriately define each market, what is the appropriately defined market? For each market:
- a. Where are mass-market customers actually being served by competitive providers, if any, located? How should the location of these customers affect the definition of the market?
 - b. What are the factors affecting competitive carriers' ability to serve each group of customers? How should these factors affect the definition of the market?
 - c. What are the factors affecting competitive carriers' ability to target and serve specific markets profitably and efficiently using currently available technology? How should these factors affect the definition of the market?
 - d. Would a carrier serving in any such market alone be able to take advantage of available scale and scope economies from serving a wider market?
 - e. Do such markets appropriately consider the geographic variability of competitive provider's ability to use self-provisioned switches or switches provide by a third-party wholesaler to serve various groups of customers?
3. For each market area determined by the Commission in which an ILEC asserts that requesting carriers are not impaired without access to unbundled local circuit switching
- a. Are there three or more competing providers serving mass-market customers with their own local circuit switches that are not affiliated with each other are the ILEC, including intermodal providers of service comparable in quality to that of the ILEC?
 - b. Are there two or more competing providers offering wholesale local circuit switching service to customers serving DS0 capacity loops using their own switches that are not affiliated with each other or the ILEC, including intermodal providers of service comparable in quality to that of the ILEC?

c. What intermodal technology, if any, provides service comparable in quality to that of the ILEC for local circuit switching?

B. Phase II Issues

4. For each geographic market in which the Commission found that the self-provisioning trigger identified in Issue 3a was satisfied, if any, are there any significant barriers to entry such that service to mass market customers is foreclosed? If so, how long will such barriers preclude further entry into that market by competitive carriers?
5. For each geographic market in which the Commission found that neither the self-provisioning trigger identified in Issue 3a nor the wholesale facilities trigger identified in Issue 3B was met, if any, is the market suitable for multiple, competitive supply?
 - a. For each market, are there two wholesale providers or three self-provisioners of switching not affiliated with each other or the ILEC serving end users using DS1 or higher capacity loops? Is there any carrier, including an intermodal provider of service comparable in quality to that of the ILEC, using a self-provisioned switch to serve end users using DS0 capacity loops? If so, are these providers capable of serving end users using DS0 capacity loops in an economic fashion?
 - b. Are there operational barriers in any market that make entry uneconomic for competitive providers?
 - i. Does the ILEC provide nondiscriminatory access to unbundled loops? Does the ILEC transfer loops in a timely and reliable manner? Are the ILEC's facilities, human resources, and processes sufficient to adequately handle the demand for loops, collocation, cross connects, and other services required by competitors for entry into the mass market?
 - ii. Are there costs or physical constraints associated with collocation in a geographic market that inhibit entry, or is likely to inhibit entry going forward, into the mass market? How much space is currently available? What is the expected growth or decline in the amount of available space? What is the expected growth or decline in competitive carrier's space needs?
 - iii. Are there delays in the ILEC's provisioning of cross-connects between the facilities of competitive providers that increase costs to such a degree that entry into the market is rendered uneconomic. What are the ILEC's practices and procedures with regard to provisioning cross-connects linking competitive carriers' facilities. What is the history of competitive carriers' complaints regarding the ILEC's past performance? What is the history of the ILEC's response to these complaints? What costs have been incurred for any deficient performance in providing cross-connects and have these costs rendered entry into the market uneconomic?

c. Are there economic barriers in any market that prevent entry into the mass market by competitive providers?

i. Considering the most efficient network architecture available, what are the likely revenues associated with local exchange mass-market service? The answer to this issue must consider all revenues resulting from service to the mass market as described in paragraph 519 of the TRO.

ii. Considering the most efficient network architecture available, what are the likely costs associated with local exchange mass-market service? The answer to this issue consider all factors affecting the costs faced by a competitive carrier providing local exchange service to the mass market as described in paragraph 520 of the TRO.

iii. How do universal service payments and implicit support flows impact competitive carriers' ability to serve specific markets?

6. What is the appropriate cut-off for multi-line DS0 customers to define the demarcation between a mass-market customer and an enterprise-market customer? When does the increased revenue opportunity at a single location from serving a customer with a higher capacity loop and a competitive carrier's own switch instead of multiple DS0 loops become sufficient to overcome impairment caused by economic barriers identified in Issue 5c?

7. For each market that the Commission determines that competitive carriers are impaired without access to unbundled local circuit switching, would such impairment be cured by transitional (rolling) access to unbundled switching for a period of 90 days or more?

This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by this Order, by the ALJ, or by the Commission in future orders issued in this docket. The Commission reserves the right to identify and provide to the ALJ in the future any additional issues or areas that must be addressed.

VII. Issues Not To Be Addressed

The Commission takes the position that the following issues need not be addressed in this proceeding for the reasons stated.

1. The ILEC's "batch cut" process.

The ILEC's batch-cut process will be addressed in Project No. 27605, *Mass Market Hot Cuts*

Process for State Implementation of the Federal Communication's Commission Triennial Review Process, or any successor docket that arises from that Project. In that project, or successor docket, the Commission will develop a batch-cut process and adopt rates for that process.⁴¹

The Commission notes that the applicability of any batch cut migration process implemented in Project No. 27605 or a successor docket will tentatively be limited to those market areas that the Commission has determined that competitive carriers are not impaired without access to unbundled local circuit switching for the mass market.

2. A transition plan to migrate the embedded base of unbundled local switching customers to an alternate serving arrangement.

To the extent the Commission finds “no impairment” for mass market customers within a particular market, the FCC requires mass market carriers to commit to an implementation plan with the appropriate incumbent LEC within two months from the finding of no impairment.⁴² There is, however, a limited amount of time to address the numerous and diverse issues in this docket within the nine-month time period. The Commission decides that this issue can be managed in subsequent proceedings and should be deferred until a later date.

VIII. Effect of Preliminary Order

The Commission’s discussion and conclusions in this Order regarding issues that are not to be addressed should be considered dispositive of those matters. Questions, if any, regarding issues that are not to be addressed may be certified to the Commission for clarification if the ALJ determines that such clarification is necessary. As to all other issues, this Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order at hearing. The ALJ, upon his or her own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this Order when circumstances dictate that it is reasonable to

⁴¹ See *Id.* ¶ 489.

⁴² See *Id.* ¶ 532

do so. Any ruling by the ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of an ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the 10th day of November 2003.

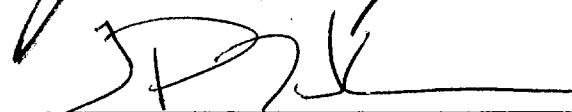
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